

No. 3540

In the <sup>10</sup>

# United States Circuit Court of Appeals

For

## The Ninth Circuit

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WILLIAM E. GOWLING,  
*Plaintiff in Error,*

vs.

UNITED STATES OF  
AMERICA,  
*Defendant in Error.*

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Brief and Argument on Behalf of Plaintiff  
in Error

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**BRIEF AND ARGUMENT ON BEHALF OF  
PLAINTIFF IN ERROR.**

STATEMENT OF THE CASE.

This is a writ of error by which William E. Gowling, plaintiff in error, hereinafter called the defendant, seeks a review of the sentence and judgment entered against him in the United States District Court for the Northern Division of the Northern District of California on the 25th day of May, 1919, whereby he was sentenced to imprisonment at McNeils Island, Washington, for a period of three (3) years and to pay a fine of Two Thousand Five Hundred dollars. (Tr. p. 25.) The defendant has been confined at said McNeil's Island for more than one year last past in execution of said sentence.

The defendant was indicted by the grand jury of said district upon five (5) counts based upon a single alleged act of transportation, the first of which said counts (omitting the preliminary and concluding paragraphs) is as follows:

“That William E. Gowling, otherwise known as W. E. Gowling, late of Sloat, California, on to wit, the third day of October, in the year of our Lord one thousand nine hundred and eighteen, unlawfully wilfully, feloniously and knowingly did transport and cause to be transported and aid and assist in transporting in interstate commerce, that is to say, from Reno, in the State of Nevada, to Sloat, in the State of California, through the said Northern Division of the said Northern District of California, in and by means of a certain automobile running over the public highways of the United States, the owner of which said automobile is to the Grand Jurors aforesaid unknown, and which said automobile was then and there in such transportation run, operated, driven and controlled by the said defendant, William E. Gowling, as aforesaid, a certain woman, to wit, Mrs. Myrna Northcutt, otherwise known as Mrs. W. E. Gowling, for a certain immoral purpose, to wit, for the purpose of debauchery.”

The remaining four counts, in their charging parts, are worded exactly the same as the charging part of the first count, as above set out, with the exception that the alleged *purpose* of the alleged transportation is in each count different, to wit: In the second count the purpose is alleged to be “of having un-

lawful sexual intercourse with her;” in the third count, “of having the said Mrs. Myrna Northcutt \* \* \* become and be the concubine and mistress of the said defendant”; in the fourth count, “with the intent and purpose to induce, entice and compel the said woman \* \* \* to give herself up to debauchery”; and in the fifth count, “with the intent and purpose to induce, entice and compel the said woman \* \* \* to be and become the mistress and concubine of the said defendant, and to live and cohabit with him, the said defendant.” (Tr. p. 3.)

To this indictment the defendant demurred generally and specifically, to wit:

“I. Upon the ground that said indictment does not, nor does either or any of the several counts thereof, state facts sufficient to constitute an offense against any law or laws of the United States of America.

II. That said indictment, and each and every count thereof, is uncertain in this: That it does not appear therein, and it can not be ascertained from said indictment or from either or any of said counts, whether or not the woman named therein is, or was at the time of the alleged offense, the wife of the defendant.

III. Uncertainty in this: That it does not appear therein, and it can not be ascertained from said indictment nor from either or any of the said counts, whether the automobile alleged to have been run, operated, driven and controlled by the defendant in the alleged transportation of the woman therein

named, was at the time of said alleged offense, or at all, engaged, or was being used, run, operated, driven, or controlled, in interstate commerce.” (Tr. p. 8.)

The demurrer was overruled and the defendant pleaded not guilty (Tr. p. 10). a trial was had which resulted in a verdict of “guilty as charged”; a motion for a new trial was made and denied (Tr. p. 27), and the defendant sentenced as aforesaid.

The record shows that the defendant and Mrs. Northcutt were first cousins; that they had been in each other's company a great deal at Superior, Wis., the home of the Northcutts and Mrs. Northcutt's family, the Pattisons; and at Ely, Minn., where the Pattisons owned a mine which was being worked by Byron M. Pattison and Northcutt; that they became very much attached to each other, in fact were in love with each other. In 1917, about July, Northcutt sailed for France, and the defendant came West and located at Sloat, California, where he became interested in some mining property. In the fall of 1917, Mrs. Northcutt, with her children and governess, went to San Diego, and on her way stopped off at Sloat to look over the mining property with the end in view of investing some money in the same. She was there three days and then went to San Diego. Later she returned to Superior, Wis., and from there forwarded several thousand dollars to the defendant at Sloat to invest for her in the mining property, which he did. In the early part of 1918, Mrs. Northcutt, after spending the winter in Southern California, went to Sloat, with her children (a

third child having been born on April 6th, 1918, and within nine months from the time she last cohabited with her husband) and established herself in a house at the mine, living therein with her said children and governess alone, and took an active interest and part in the mining operations. About September 1st, 1918, it became necessary for the defendant to go to Duluth, Minn., to defend a civil action brought there against him by Mrs. Northcutt's brother, Byron M. Pattison. Mrs. Northcutt desired to make a visit East, and decided to go at the same time, and her friend, Miss Verna MacLeod, a reporter on the "Enterprise," a newspaper at Riverside, Cal., went with them at Mrs. Northcutt's invitation. Mrs. Northcutt purchased *round trip* tickets for herself and Miss MacLeod, and the defendant purchased *round trip* tickets for himself and Thos. Sullivan, a witness in the said lawsuit. They all drove to Reno, Nev., in Mrs. Northcutt's private automobile, left the car there, and took the Southern Pacific train East. After the trial of said case, the defendant, instead of returning direct to Sloat, went to Arizona to see about raising more money for the mine, and from there returned to Sloat. About October 2nd, 1918, Mrs. Northcutt, her children, Miss MacLeod, and Thos. Sullivan arrived at Reno on their return from the East, and the defendant met them there, and the next day drove Mrs. Northcutt and her children in Mrs. Northcutt's said private automobile back to Sloat, where Mrs. Northcutt resumed her residence under the same conditions as before. (Testy. of Mrs. Northcutt, Tr. pp. 307-400.) This was the trip—

the return to Sloat from Reno in Mrs. Northcutt's private car—which was made the basis of the charge of “transportation in interstate commerce for immoral purposes.”

### SPECIFICATION OF ERRORS.

The defendant, as it appears from the transcript herein (Tr. pp. 30, *et seq.*) has assigned eighty-four errors. In the argument counsel will confine himself to a few of the most serious errors assigned, relying, however, upon each and all of the errors assigned as appears by the transcript. The following errors will be discussed in this brief, to wit:

1. The court erred in overruling the demurrer to the indictment, and in not sustaining said demurrer. (Ass. of Er., I and II; Tr. pp. 8-10.)

2. The trial court erred in asking the following question of defendant's witness, R. S. Briscoe: “A small reputation or a small place?” and in failing to properly instruct the jury in regard thereto. (Ass. of Er. XIX and XX; Tr. p. 232.)

3. The trial court erred in refusing to grant the motion of defendant's counsel to strike out all testimony in the case tending to deny the legitimacy of the youngest child of C. A. Northcutt and Mrs. Myrna P. Northcutt, his wife, and to instruct the jury to disregard the same. (Ass. of Er. XL; Tr. pp. 374 to 376 inc.)

4. The trial court erred in overruling the objection of defendant's counsel to the following argument of the prosecuting attorney in his opening ad-

dress to the jury upon the close of the taking of the evidence in the case, and in approving of said line of argument of said prosecuting attorney, and in failing to instruct the jury to disregard said line of argument, to wit: “Now, gentlemen of the jury, can you, as twelve honorable men, chosen by reason of that very fact, say that William E. Gowling, this defendant, is innocent of the charge your government has brought against him; is innocent of sneaking into the home of his friend and relative and there destroying the very ties that bind the husband and wife together; is innocent of taking advantage of the trust and confidence of Carleton Northcutt, who left his home and friends and relatives and all that there was—” (Ass. of Er. LVI; Tr. pp. 407 to 409.)

5. The trial court erred in failing and refusing to reprimand the prosecuting attorney for using the following language in his closing argument to the jury, which was spoken of the counsel for the defendant, to wit: “And that is one of the cleverest things he did during the whole trial, except one which the law forbids me to mention, gentlemen of the jury.”; in this that said statement and argument was calculated to and did refer to the fact that the defendant did not testify in the case, and was intended to influence the jury to believe that had the said defendant testified it would have been the worse for him. (Ass. of Er. LIX; Tr. p. 410.)

6. The trial court erred in refusing and failing to reprimand the prosecuting attorney for his reference in his closing argument to the fact that the

defendant had not testified in his own behalf, and in failing to properly instruct the jury that such argument was error and to disregard the same, to wit: "Now, it was stated by Mr. Duryea that there was someone here that was willing to drag this little woman through the mire of this action and brand her as a white slave, and I want to tell you that there is somebody here that is willing to do that, and that somebody is Frank Duryea and the defendant here, because she was brought here so that the defendant could hide behind her skirts, and put on that witness stand, and she was left alone to bear the brunt of this whole proposition on that witness stand alone." (Ass. or Er. LX; Tr. pp. 410 to 411.)

7. The trial court erred in giving to the jury those parts of the following instruction printed in italics, to wit: "The defendant is on trial under an indictment charging him with a violation of what is designated and commonly referred to as the White Slave Traffic Act, being an act of Congress intended and having the purpose to suppress the transportation in interstate commerce of women or girls for immoral purposes and thus protect the commerce of the country from being subjected to such contaminating influence. *That act, so far as here involved, provides, in substance, that any person who shall knowingly transport or cause to be transported, in interstate commerce, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute, or to give herself up to de-*

bauchery, or to engage in any other immoral practice; or who shall knowingly procure or obtain or cause to be procured or obtained, or aid or assist in procuring or obtaining, any form of transportation, to be used by *or on behalf of* any such woman or girl in interstate commerce, in going to any place for the purpose of prostitution or debauchery or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery or any other immoral practice, whereby any such woman or girl shall be transported in interstate commerce; or who shall *persuade, induce or entice, any such woman or girl to be so transported in interstate commerce for any such immoral purpose; is deemed guilty of a public offense.*" (Ass. of Er. LXI; Tr. pp. 411-412.)

8. The trial court erred in giving to the jury those parts of the following instruction printed in italics, to wit: "*The statute, as you will note, is very comprehensive on the subject of which it treats, and covers several distinct and different acts, each one of which is made a criminal offense under its provisions; first, the transporting or aiding in the transportation in interstate commerce of a woman or girl for such immoral purpose or with the intent to induce, entice or compel her to give herself up to such immoral purpose; second, procuring or aiding in procuring a ticket or other form of right to transportation, to be used by such woman or girl in interstate commerce for such immoral purpose, or with the*

intent to induce, entice or compel her to give herself up to such practices, and whereby she shall be transported in interstate commerce; and, *third, the persuading, inducing or enticing any such woman or girl to be so transported in interstate commerce for such immoral purpose. All of these different acts constitute separate offenses under the statute.* Under the first it is an offense to transport or aid in the transportation of such female for the purpose denounced, *whether she goes of her own volition, that is, willingly, or is induced to go by the means stated in the statute,* and whether she is to commit the immoral acts specified with the person so transporting her or with some other person or persons; under the second it is an offense to procure or aid in the procuring of the means of transportation of such woman, whereby she is transported or carried for such unlawful purpose, *and this whether she goes willingly or is induced by some one of the means mentioned in the statute to undergo such transportation,* whether it is intended that she shall commit the immoral acts with the one so procuring of such means of transportation or with some other person or persons; *and under the third phase of the statute it is an offense to persuade, induce or entice such woman or girl to be so carried or transported for such immoral purpose whether the act of immorality is to be committed with the person so persuading, inducing or enticing her or with another or others.”* (Ass. of Er. LXII; Tr. pp. 413-414.)

9. The trial court erred in giving the following instruction to the jury, to wit: “As to the third

phase of the act referred to, that of persuading, inducing or enticing, it is not essential to guilt under these terms that any particular method shall be employed. The terms persuade, induce and entice are used in the statute in their ordinary, popular sense, and imply the arts of entreaty, protestations of affection, allurements, promise of marriage, or similar means to influence the mind or inclination of the woman and induce her to consent to be transported for such immoral purpose.” (Ass. of Er. LXIII; Tr. pp. 414-415.)

10. The trial court erred in giving to the jury those parts of the following instruction printed in italics, to wit: “The indictment in this case is framed in five separate counts, *which you will find to cover and include the several acts denounced in the statute as I have outlined them above*, and charges the acts of the defendant as having relation to one Mrs. Myrna Northcutt, with references to whom it is charged the statute has been violated by such defendant. The uniting of the several different acts or offenses charged in one pleading or indictment is proper under the Federal statutes.” (Ass. of Er. LXIV; Tr. p. 415.)

11. The trial court erred in giving to the jury those parts of the following instruction printed in italics, to wit: “*These different counts are intended to meet the different phases of the act which I have defined to you* and enable the jury to apply the evidence to the charge in an intelligent and discriminating manner and determine the facts as to the guilt or innocence of the defendant *under the different*

*phases of this act, the only difference between the counts being the specific intent alleged. You will observe that each one of these counts covers an act committed on the same date by the same means, between the same points, and with reference to the same woman, the only difference in each count being the form and the specific intent with which that act was committed, and that is permitted to be done, that character of indictment is permitted to be filed, because it can not in many instances be known by the grand jury precisely what the evidence will disclose as the specific intent of the defendant, and so it is permitted to be charged in the various forms which are justified by the terms of the statute.”* (Ass. of Er. LXV; Tr. pp. 416-417.)

12. The court erred in giving the following instruction to the jury, to wit: “It is immaterial under the statute here involved what the character of Mrs. Northcutt was at the time of the acts charged, so long as the intent with which such acts were done is shown to the satisfaction of the jury; that is to say, if it appears in this case to your satisfaction that the defendant committed the acts charged in any one or more of these counts for the illegal purpose alleged therein, it is wholly immaterial, except in so far as it may affect your consideration of her testimony, or the motive with which she was sought to be transported, whether Mrs. Northcutt had previously had sexual intercourse with the defendant or not or was yet entirely chaste. In other words the Act in question denounces the carrying in interstate commerce, for the immoral purposes specified, of any

woman or girl, and a defendant violates the Act when he does any of the things prohibited thereby, regardless of the fact as to whether the woman or girl who is the subject of his act had been previously lewd in her conduct, or whether or not he has himself previously had illicit intercourse with her. The act is intended primarily to suppress the traffic against which it is aimed and to keep our interstate traffic pure, and incidentally is intended as much for the protection from further temptation and wrong of a woman who has already been seduced to a lewd course as for those whose lives have previously been innocent of wrong." (Ass. of Er. LXVII; Tr. p. 420.)

13. The court erred in giving the following instruction to the jury, to wit: "The law, in its charity, presumes the innocence of a defendant, and that presumption abides with him throughout the trial, and until his guilt is established by the evidence." (Ass. of Er. LXVIII; Tr. p. 421.)

14. The court erred in refusing and failing to give to the jury the following instruction No. 2 requested by the defendant, to wit: "I instruct you that the terms 'debauchery,' 'concubine,' 'mistress,' and 'cohabit,' as used in the indictment, have the following definitions and must be so regarded and treated by you in arriving at a verdict in this case: 'Debauchery' means that the woman is to be subjected *repeatedly* to unlawful sexual intercourse or fornication or adultery. A 'concubine' is a woman who cohabits with a man without being his wife; a kept mistress, that is, a woman who is kept by a

man for the purposes of unlawful cohabitation. A 'mistress' is also defined as a woman who unlawfully or without marriage fills the place of a wife, and who is kept and supported by the man as his paramour. 'Cohabitation' is the dwelling and living together of a man and woman as though married, and with the appearance of being married and having sexual intercourse more or less continuously." (Ass. of Er. LXXI; Tr. pp. 430 and 432.)

15. The court erred in refusing and failing to give to the jury the following instruction No. 4 requested by the defendant, to wit: "You are instructed that the defendant is presumed to be innocent of the crime charged against him, and you must give to the defendant the benefit of this presumption of innocence throughout the entire progress of the trial, and until it is overcome by evidence in the case proving his guilt to your entire satisfaction and beyond a reasonable doubt, and not until then is this presumption of innocence removed or set aside." (Ass. of Er. LXII; Tr. pp. 430 and 433.)

16. The court erred in refusing and failing to give to the jury the following instruction No. 18 requested by the defendant, to wit: "I charge you that Mrs. Northcutt had the right to go to Sloat, California, and to the property of the Feather River Gold Mines Company for business purposes, and to establish a temporary or permanent home there if she chose to do so, and if you find from the evidence that she did go there for business purposes, and that she did invest in the said mining company property and become a stockholder therein, you must consider that

circumstance in determining whether or not she was there for any immoral or indecent practices in connection with the defendant.” (Ass. of Er. LXXVIII; Tr. p. 430 and 435.)

17. The court erred in refusing and failing to give to the jury the following instruction No. 19 requested by the defendant, to wit: “You are instructed that if you believe from the evidence that Myrna P. Northcutt had an established home at or near Sloat, California, and at the time alleged in the indictment was returning to her home and was aided or assisted by defendant, but not for the purpose alleged in the indictment, you must find defendant not guilty, even though you may believe there is some evidence in the case tending to show immoral acts between them thereafter.” (Ass. of Er. LXXIX; Tr. pp. 430 and 435.)

18. The trial court erred in failing and refusing to give to the jury defendant’s requested additional instruction No. 1, to wit: “You are instructed that the issue of a wife cohabiting with her husband who is not impotent is indisputably presumed to be legitimate. The word ‘cohabiting’ in this connection means the living together of a husband and wife and neither of them is a competent witness to prove the absence of sexual intercourse during their cohabiting nor that a child born as a result of such cohabitation was the illegitimate child of another man if the husband is not shown to have been impotent. The presumption thus established is not to be rebutted by circumstances which only create doubt and suspicion but it may be wholly removed by proper and

sufficient evidence showing that the husband was

1. Impotent.
2. Entirely absent so as to have no intercourse, or communication of any kind with the mother.
3. Entirely absent at the period during which the child must in the course of nature have been begotten.
4. Only present under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse." (Ass. of Er. LXXXII; Tr. pp. 430 and 436.)

19. The trial court erred and abused its discretion in denying defendant's motion for a new trial in this:

(a) That the verdict is contrary to law because the indictment does not state facts sufficient to constitute an offense under any law of the United States, in this, that it is alleged in the indictment and in each count thereof that the transportation of the woman, Mrs. Myrna Northcutt, was accomplished by means of a private automobile, and it is not shown that said automobile was then and there being used in interstate commerce;

(b) That said verdict is not supported by the evidence in the case, in this, that there is not sufficient evidence in the case to support a finding that the defendant, at the time he drove Mrs. Myrna Northcutt's private automobile from Reno, Nevada, to Sloat, California, on October 3rd, 1918, as alleged in the indictment, and with the said Mrs. Myrna

Northcutt in the said automobile, intended at said time to transport the said Mrs. Myrna Northcutt in interstate commerce or at all for the immoral purposes or any of them alleged in the indictment;

(c) That the court upon the trial of said case admitted incompetent and immaterial evidence offered by the United States to the prejudice of the defendant;

(d) That the court upon the trial of the case excluded competent and material evidence offered by the defendant, to the prejudice of the defendant;

(e) That the court improperly instructed the jury to the defendant's prejudice;

(f) That the court improperly refused, to the defendant's prejudice, to give correct instructions to the jury requested by the defendant;

(g) That the court improperly permitted counsel for the government to argue to the jury immaterial and irrelevant matters not in issue and which tended to and did improperly influence the jury to the defendant's prejudice. (Ass. of Fr. LXXXIII; Tr. pp. 27 and 24.)

## ARGUMENT.

We shall discuss the foregoing specifications in their order.

1. The demurrer to the indictment should have been sustained for the reason that said indictment and each count thereof shows on its face that the alleged transportation was not in "interstate commerce" within the meaning and intent of the Act.

The indictment was drawn under the provisions of certain portions of the "White Slave Traffic Act," to wit, certain provisions of Sec. 2 of that Act as follows:

Sec. 2. That any person who shall knowingly transport or cause to be transported, or aid or assist \* \* \* in transporting, in interstate \* \* \* commerce \* \* \* any woman or girl for the purpose of \* \* \* debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to \* \* \* give herself up to debauchery, or to engage in any other immoral practice, \* \* \* shall be deemed guilty of a felony, and upon conviction thereof shall be punished etc. (36 St. L. 825.)

It is not alleged or shown in the indictment that the automobile was engaged in interstate commerce, or was a common carrier, and we contend that it must be so shown in order to state an offense within the intent of the statute. It will be contended, no doubt, that that question has been decided by the Supreme Court adversely to our said contention in the case of *Wilson vs. U. S.*, 232 U. S. 563, 58 L. Ed. 728, and it has been generally so supposed. But a careful analysis of the subject and the said decision will show otherwise. In that case, *Wilson vs. U. S.*, *supra*, the point was raised that because the transportation was had over the line of an interstate "electric railroad" which had been, in the civil action of *Omaha & C. B. Street R. Co. vs. Interstate Commerce Commission*, 230 U. S. 324, 57 L. Ed. 1501, held not to be a "common carrier" within the pro-

visions of the Interstate Commerce Act, the defendant in the Wilson case was not therefore guilty, and the constitutionality of the White Slave Act was questioned. The Supreme Court said: "The prohibition is not in terms confined to transportation by common carrier, nor need such a limitation be implied in order to sustain the constitutionality of the enactment." The indictment in that case was also drawn under the provisions of Sec. 2 of the White Slave Act. There is nothing in the opinion which shows that in construing the Act the *whole* of the Act, nor any of the other sections thereof, was considered in arriving at the decision. That, however, is of no importance at this stage of the argument, but will be adverted to a little later herein. The point we desire to make here is, that the language of the court above quoted must be read and interpreted with reference to the fact that an "electric railroad," if engaged in transporting passengers for hire, *is* a *common carrier*, as that term is commonly and broadly applied to all such means of transportation, although that particular road had been held not to be a "common carrier" within the terms of the *Interstate Commerce Act*. The transportation of the woman in the Wilson case was, in fact, over the line of a *common carrier*, and the Supreme Court undoubtedly so viewed it. The language, therefore, that "The prohibition is not in terms confined to transportation by common carrier," was not necessary to the decision, and should be regarded as *dictum*. Had the act of transportation in that case been by private automobile, as here, we apprehend that the court would have

held it not within the terms or intent of the Act, particularly if Sec. 2 of the Act were construed with reference to the other sections, to wit, 3, 4, and 5.

The interpretation of legislative acts is governed by certain well established rules, among which are the following :

A legislative act is to be interpreted according to the intention of the legislature apparent upon its face.

U. S. vs. Fisher, 109 U. S. 145;

U. S. vs. Goldenberg, 168 U. S. 102.

There is always a tendency to construe statutes in the light in which they appear when the construction is given. It is easy to be wise after one sees the results of experience.

Justice Story, in *Platt vs. U. P. R. R. Co.*, 99 U. S. 63.

The true rule is that statutes are to be construed as they were intended to be understood when they were passed.

*Schuyler vs. Thomas*, 98 U. S. 172,

wherein Justice Hunt said: "The after wisdom, obtained by unfortunate results, can not be applied in their interpretation."

*Platt vs. U. S.*, *supra*;

U. S. vs. U. P. R. Co., 91 U. S. 81;

*Wash. Market Co. vs. Hoffman*, 101 U. S. 119.

While a court in construing a penal statute is not

required to shut its eyes to notorious mischiefs which it was intended to suppress, (*Holy Trinity Church vs. U. S.*, 143 U. S. 163, *U. S. vs. Sullivan*, 43 Fed. 604, *U. S. vs. Mattock*, 2 Sawy. (U. S.) 148), care must be observed not to extend the statute to offenses not embraced within its language, merely because they involve the same mischief which the statute aimed to suppress.

*U. S. vs. Chase*, 135 U. S. 261;

*U. S. vs. Hewecker*, 79 Fed. 64.

In construing a statute recourse must be had to the context, and all its provisions must be considered together.

*Mo. etc. R. Co. vs. Haber*, 169 U. S. 635;

*U. S. vs. Burr*, 159 U. S. 84;

*U. S. vs. Moore*, 95 U. S. 762;

*U. S. vs. Boisdore*, 8 How. 121;

*U. S. vs. Fischer*, 2 Cranch. (U.S.) 386;

*Strong vs. U. S.*, 93 Fed. 260;

*U. S. vs. Morton*, (C.C.A.) 65 Fed. 210.

That a law is the best expositor of itself; that every part of an act is to be taken into view for the purpose of discovering the mind of the legislature; and that the details of one part may contain regulations *restricting the extent of general expressions* used in another part of the same act, are among those plain rules laid down by common sense for the exposition of statutes which have been uniformly acknowledged, (*Italics ours.*)

Chief Justice Marshall in Pennington vs. Coxe,  
2 Cranch 52.

The various provisions of an act should be read so that all may, if possible, have their due and *conjoint* effect without *repugnancy* or *inconsistency*. (Italics ours.)

New Lamp etc. Co. vs. Ansonia Brass etc. Co.,  
91 U. S. 662;

Patterson vs. Winn, 11 Wheat. (U.S.) 389;

U. S. vs. Newhall, 91 Fed. 529;

U. S. vs. Hammond, (C.C.A.) 104 Fed. 864;

In *re* Yertwillig, (C.C.A.) 92 Fed. 339;

U. S. vs. Landram, 118 U. S. 85.

But where absolute harmony between parts of a statute is demonstrably non-existent, the court *must reject* that one which is least in accord with the general plan of the whole (In *re* Hammond, 98 Fed. 845) or if there be no ground for choice between inharmonious sections, *the later section* being the *last expression* of the legislative mind must, in construction, vacate the former to the *extent* of the *repugnancy*. (Italics ours.)

In *re* Richards (C.C.A.) 96 Fed. 935;

In *re* Tune, 115 Fed. 911.

In construing a criminal statute containing more than one section, the Supreme Court, in the case of U. S. vs. Burr, 159 U. S. 84, said: “In arriving at the true intention of Congress, we *can not treat Sec. 1 as if it constituted the entire act, but must deduce*

*the intention from a view of the whole statute and from the material parts thereof.*" (Italics ours.)

In the case of Holy Trinity Church vs. U. S., 143 U. S. 463, the Supreme Court said: "Another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this, the court looks at contemporaneous events, the *situation as it existed and as it was pressed upon the attention of the legislative body.* (Italics ours.) And in the U. S. vs. U. P. R. T. Co., 91 U. S. 79, the court said: "The act itself speaks the will of Congress, and this is to be ascertained from the language used. But courts, in construing such statute, may with propriety *recur to the history of the times when it was passed, and this is frequently necessary in order to ascertain the reason, as well as the meaning, of particular provisions of it.*" (Italics ours.) And on this same point it was said in Preston vs. Broader, 1 Wheat. 121: "It is frequently necessary (in the construction of statutes) to *recur to the history and situation of the country in order to ascertain the reason, as well as the meaning, of many of the provisions in them, to enable a court to apply with propriety the different rules for construing statutes.* (Italics ours.)

In view of these rules of construction, it is necessary here to take into view the provisions of the other sections of the White Slave Traffic Act, and the conditions existing at the time of its passage in 1910, in order to ascertain whether Congress intended to include transportation by means other than "common carriers," or, in other words, whether transportation by a private automobile is embraced within the prohibition of the statute.

Sec. 3 of the Act reads as follows: "That any person who shall knowingly persuade, induce, entice or coerce, or cause to be persuaded, induced, enticed, or coerced, or aid or assist in persuading, inducing, enticing, or coercing any woman or girl to go from one place to another in *interstate or foreign commerce*, or in any Territory or the District of Columbia, for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person that such woman or girl shall engage in the practice of prostitution or debauchery, or any other immoral practice, whether with or without her consent, and who shall thereby knowingly cause or aid or assist in causing such woman or girl to go and be *carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce*, or any Territory or the District of Columbia, shall be deemed guilty of a felony and on conviction thereof shall be punished" etc. (Italics ours.) (36 St. L. 825.)

Sec. 4 of said Act is as follows: "That any person who shall knowingly persuade, induce, entice, or coerce any woman or girl under the age of eighteen years from any State or Territory or the District of Columbia, with the purpose and intent to induce or coerce her, or that she shall be induced or coerced to engage in prostitution or debauchery, or any other immoral practice, and shall in furtherance of such purpose knowingly *induce or cause her to go and to be carried or transported as a passenger in interstate commerce upon the line or route of any common carrier or carriers*, shall be deemed guilty of a felony,

and on conviction thereof shall be punished by a fine of not more than *ten thousand dollars*, or by imprisonment for a term not exceeding *ten years*, or *by both such fine and imprisonment*," etc. (Italics ours.) (36 St. L. 826.)

Sec. 5 (Jurisdiction of courts) reads as follows: "That any violation of any of the above sections two, three, and four shall be prosecuted in any court having jurisdiction of crimes within the district in which said violation was committed, or *from, through, or into which any such woman or girl may be carried or transported as a passenger in interstate or foreign commerce*, or in any Territory or the District of Columbia, contrary to the provisions of any of said sections." (Italics ours.) (36 St. L. 826.)

Now, it will be observed that under sections 3 and 4 of the Act a conviction can not be had unless it be alleged and proven that the woman or girl was *carried or transported as a passenger upon the line or route of a common carrier or carriers in interstate or foreign commerce, or in any Territory or the District of Columbia*. And yet the acts or crimes denounced in said sections are far more reprehensible than the simple act of transportation, etc., of a woman or girl as denounced in Sec. 2 of the Act. Indeed, the crime denounced in Sec. 4 is considered so much more reprehensible, as it should be, that the punishment is just *double* that provided in Sec. 2. Can it be reasonably or in common sense said that Congress intended to make the *greater* crime easier to commit with impunity by limiting the transportation or carrying of the girl to that of a *common carrier*, and did not intend to so limit the lesser

crime? If such an interpretation is to be placed upon the Act, then a person can commit the acts denounced in sections 3 and 4 by the simple expedient of causing the transportation of a most innocent girl by means of a private conveyance of any kind and escape punishment under the Act (which is true, as must be conceded), while the person who transports or aids or assists in transporting a woman or girl (be she ever so willing, and be she even the worst kind of a prostitute) by means of any conveyance, whether a common carrier or not, must be subject to prosecution and punishment. It seems to us absurd to say that Congress, in view of these considerations, intended any such effect of the Act. On the contrary it must have been intended to limit the transportation in all cases to that by common carrier; otherwise, such limitation would not have been placed in some of the sections and not in the other. The true rule here would be to make Sec. 2 harmonize with the other sections in order to put a reasonable and effective construction upon the entire Act. As was said In *re Richards*, *supra*, "If there be no ground for choice between inharmonious sections, the *later section* being the last expression of the legislative mind *must*, in construction, vacate the *former* to the *extent* of the *repugnancy*." And in *U. S. vs. Burr*, *supra*, "In arriving at the true intention of Congress, *we can not treat Sec. 1 as if it constituted the entire act, but must deduce the intention from a view of the whole statute and from the material parts thereof.*" (Italics ours.)

Again: Sec. 5, conferring jurisdiction on the

courts under the Act, provides that “any violation of any of the above sections two, three, and four shall be prosecuted in any court having jurisdiction of crimes within the district in which said violation was committed, or *from, through, or into* which any such woman or girl may have been *carried or transported* as a *passenger in interstate or foreign commerce.*”

The term “passenger” has a definite legal meaning, and has been defined by the courts.

The word “passenger” means one who travels in some *public conveyance* by virtue of a contract, express or implied, with a carrier on the payment of fare or that which is accepted as an equivalent therefor. (*Italics ours.*)

Birmingham Ry. etc. vs. Adams, 146 Ala. 267,  
119 Am. St. Rep. 27.

The term “passenger” is said to include all persons who pay freight for their persons, apart from merchandise.

The Main vs. Williams, 14 Sup. Ct. 486, 152  
U. S. 122, 38 L. Ed. 381.

The Standard dictionary defines “passenger” as “A person who travels in a public conveyance, as a railway car or a steamship; one carried for fare by a common carrier.”

Sec. 5 therefore must be read in connection with Sections 2, 3, and 4, to determine whether Congress intended that the act of transportation, in order to give the courts jurisdiction, must take place over “the line or lines of a common carrier, etc.” As

there is nothing in the Act to indicate that Congress used the term "passenger" in Sec. 5 in any other sense than as one carried in a public conveyance, that is, by a common carrier, it must be held that the word was used with its common, ordinary meaning, and that a woman or girl carried or transported by private conveyance would not be within the terms of the Act. And in that behalf, attention is here called to the allegation in each count of the indictment, to wit, that the defendant did transport, etc., "from Reno, in the State of Nevada, to Sloat, in the State of California, *through* the said Northern Division of the said Northern District of California," in order, we must assume, to bring the accusation within the terms of said Sec. 5 that the court might have jurisdiction.

We now contend, and make the point here, that because the indictment does not allege or show that the transportation was by means of a common carrier in interstate commerce, the court had no jurisdiction to try the defendant.

A very interesting decision involving the construction of a similar statute is that of

U. S. vs. Sheldon, 2 Wheat. (U. S.) 119, wherein the Supreme Court construed the provisions of an act which made it a misdemeanor for any one to "*transport*, or attempt to transport, overland or otherwise, in any wagon, cart, sleigh, boat *or otherwise*, naval etc. stores etc. from the United States to Canada, etc." The defendant was charged with a violation of the act by driving, on foot, living oxen, cows, steers, etc., from the United States into Can-

ada. The court held that such act did not come within the inhibition of the statute.

Now, to recur to the history of the time at which the Act was passed, and the conditions then existing. In 1910 when the Act was passed, automobiles were only just beginning to come into general use, and that only for limited distances, their use then being confined generally to cities and their suburbs. Today, of course, they are in general use for long distance travel, almost to the exclusion of all other means of travel on land except railroads. Many of them have now become "common carriers," competing with railroads. That condition did not exist at the time the White Slave Traffic Act was passed, and it is only reasonable to suppose that Congress did not contemplate nor have in view the possible expansion of the automobile industry nor the improvements which have since been made in them and which have of late years brought them into almost universal use for travel by land. In the year 1909, there were but 114,891 automobiles and motor vehicles of all kinds produced in the United States; at the end of 1910, six months after the passage of the White Slave Act, the number had increased to 200,000; *Encyc. Brit.*, Vol. XVIII, p. 920. In 1916, or six years after the passage of the Act, the number had increased to 1,200,000; *Encyc. Americana*, Vol. 2, p. 643.

We submit that the demurrer should have been sustained, and that the trial court erred in overruling said demurrer.

Spec. 2. The trial court erred in asking the question of R. S. Briscoe, a witness for the defendant,

to wit: "A small reputation or a small place?" and in failing to properly instruct the jury to wholly disregard the same. (Spec. 2; Ass. of Er. XIX and XX; Exception No. 16, Tr. p. 232.)

It will be observed that the court was cross-examining the witness upon the question of the defendant's reputation. The question itself would seem to indicate that the court was trying to belittle the witness' testimony, and tended to show bias and prejudice against the defendant, and its effect upon the jury was prejudicial to the defendant. The striking out of the "question" and the "withdrawal of the remark" by the court, with the statement that the court misunderstood the witness, was insufficient to remove from the minds of the jury the unfavorable impression occasioned by the remark. The jury, in order to remove such unfavorable impression as far as possible, should have been specifically instructed at that time to wholly disregard the same, with such other instructions as would most naturally tend to remove from their minds any prejudice against the defendant which might have been occasioned by the remark. We contend that it was prejudicial and reversible error.

While it is the duty of the trial judge in a criminal prosecution in the Federal court, to facilitate the orderly progress of the trial, and to shorten unimportant preliminaries, and discourage dilatory tactics of counsel, it is improper for the judge to take part in the cross-examination of defendant's witnesses in such a manner as to impress the jury with

the idea that the judge had a fixed opinion that accused was guilty and should be convicted.

Adler vs. U. S., 182 Fed. 464;

Starr vs. U. S., 153 U. S. 614.

Spec. 3. The question here involved was the legitimacy of the youngest child of C. A. Northcutt and Mrs. Northcutt. Northcutt had testified in chief that he was the husband of Mrs. Myrna Northcutt, and that he had *two* children. (Tr. p. 78.) Mrs. Northcutt testified that she was the wife of C. A. Northcutt; that they were married April 12, 1911; that they had *three* children; that the youngest was born April 6, 1918; that the last time she and her husband had resided and cohabited together was for about three weeks immediately prior to July 28th, 1917, and they had the ordinary matrimonial relations during that period. (Tr. pp. 307-308.) There was no contradiction of said Mrs. Northcutt's said testimony. It will be observed that Northcutt's testimony, given as the first witness at the trial, was not an affirmative declaration that the youngest child was not his, but later when it did appear that there were three children, the only inference that could be drawn from his said testimony was that he denied that he was the father of said child; and it was made to appear positively later when, in the cross-examination of Mrs. Northcutt, the prosecuting attorney demanded that the "baby" be brought into court for the purpose of exhibition to the jury, the objection of counsel for the defendant, the motion of defendant to strike out all evidence relating thereto, and the colloquy

that thereupon took place among the court and respective counsel. (Tr. pp. 374-376.) The court sustained the objection, but not upon the ground of objection, (Tr. pp. 374-376) and positively stating in the presence of the jury that the rule which precludes a parent's denying the legitimacy of a child born under said circumstances does not apply in cases of this kind, and denied the motion to strike out upon that ground and upon the further ground that no objection had been made to the testimony. As to the latter ground, we submit that no objection could have been properly made at the time Northcutt testified having only two children. A general instruction was offered at the close of the case, upon the subject, which the court refused to give, (Ass. of Er. LXXXII), and to which the defendant duly excepted. (Tr. pp. 430 and 436.)

The rule that a child born in lawful wedlock is presumed to be legitimate is one of the strongest presumptions in the law and can not be overcome by testimony of either the husband or the wife.

Peo. vs. Case (Mich.), 137 N. W. 55.

The rule applies in criminal cases as well as in civil cases.

Chamberlain vs. Peo., 23 N. Y. 85, 80 Am. Dec. 255.

See also

Patterson vs. Gaines, 6 How. (U. S.) 550;

Dennison vs. Page, 29 Pa. St. 420, 2 L. R. A. (N. S.) 620, note.

Spec. 4. The overruling by the court of defendant's objection to the argument of the prosecuting attorney set out in this specification and in approving said argument and failing to instruct the jury to disregard the same was prejudicial error. (Spec. 4; Ass. of Er. LVI; Tr. p. 407.)

It is improper for the prosecuting attorney to argue upon matters outside the issues in the case and which would not be relevant if offered in evidence.

16 C. J. 899, and cases there cited.

This line of argument tended to confuse in the minds of the jury the real issue. It was not based upon the evidence, or the issue, but was intended to influence the jury and prejudice them against the defendant to the end that a verdict might be obtained against the defendant. We contend that it was prejudicial error.

Spec. 5 and 6. These two specifications cover like errors, and will be argued together. (Spec. Nos. 5 and 6; Ass. of Er. LIX and LX; Tr. p. 410.)

The statement of the prosecuting attorney, "except one that the law forbids me to mention about, gentlemen of the jury," lines 12, 13, and 14, Tr. p. 410, referred of course, to the fact that the defendant did not testify in the case. This is made plainer in the remarks of the prosecuting attorney set out in Specification 6 herein (Tr. p. 410, lines 23 to 31). A reading of these remarks can not fail to disclose that the prosecuting attorney referred directly to the fact that the defendant did not testify, and the jury

could not have understood otherwise. The woman in the case, Mrs. Northcutt, had testified fully and had denied positively that there had been any immoral relations between the defendant and her. (Tr. pp. 307-401; see p. 338, lines 28 to 30.) The defendant did not testify.

It is reversible error for the prosecuting attorney to call the attention of the jury in any way to the defendant's right to testify on his own behalf.

McKnight vs. U. S., 115 Fed. (C. C. A.) 972.

It was also held in that case that the error was not cured by the fact that the defendant actually testified afterward.

Under statutes providing that the accused's failure to testify shall not create any presumption against him, it is improper and erroneous for the prosecuting attorney to comment upon, or to make any reference in his argument to, accused's neglect or failure to take the stand and testify, *either directly or so pertinently as to direct the jury's attention to such fact, and it is the duty of the court to see that such impropriety is not committed.* (Italics ours.)

16 C. J. 901, citing, among other cases, the case of Wilson vs. U. S., 149 U. S. 60, 37 L. Ed. 650.

Spec. 7 to 11, inc. These specifications all relate to and cover errors of the same general character in the giving of instructions and will be argued together. (Spec. 7 to 11, inc.; Ass. or Er. LXI to LXV, inc.; Tr. pp. 412-417.)

The court will observe that the indictment herein,

as hereinbefore pointed out, and each count thereof. is drawn under the provisions of Sec. 2 of the White Slave Traffic Act. It charges the defendant only with "transporting, and aiding and assisting in transporting" Mrs. Northcutt for the various immoral purposes alleged in the different counts. The defendant is *not* charged with *persuading, inducing, or enticing* the woman *to be transported*, which is the subject of denunciation in Sections 3 and 4 of the Act, nor was he being tried for such. Yet the court specifically instructed the jury in that behalf, designating it as the *third phase* of the Act. The portions of the said instructions involving that error are italicized in the Specifications herein (Except Spec. 9), and in the Assignment of Errors they are underscored (except Ass. No. LXIII) for the purpose of italicizing had the transcript been printed, as it was thought it might be when the Assignments of Error were drawn. (Ass. of Er., Tr. pp. 44-47.) These and other instructions were duly excepted to by counsel for the defendant, (Tr. pp. 437-438).

Such instructions were erroneously given because they involved or applied law not applicable to the case, and could only tend to confuse the issue in the minds of the jury, particularly after a long trial wherein the prosecution was permitted to cover a very wide range of testimony and introduce scores of telegrams, letters and other documents without direction by the court as to what, if any, portions thereof were applicable to the issue involved.

The portions of the said instructions complained of are as follows: That act, (White Slave Traffic Act)

so far as here involved, provides, in substance, that any person who shall \* \* \* persuade, induce or entice, any such woman or girl to be so transported in interstate commerce for any such immoral purpose; is guilty of a public offense (Ass. of Er. LXI).

\* \* \* The statute, as you will note, is very comprehensive on the subject of which it treats, and covers several distinct and different acts, each one of which is made a criminal offense under its provisions; \* \* \* and, third, the persuading, inducing or enticing any such woman or girl to be so transported in interstate commerce for such immoral purpose. All of these different acts constitute separate offenses under the statute. \* \* \* under the third phase of the statute it is an offense to persuade, induce or entice such woman or girl to be so carried or transported for such immoral purpose whether the act of immorality is to be committed with the person so persuading, inducing or enticing her or with another or others. (Ass. of Er. LXII.) \* \* \* As to the third phase of the act referred to, that of persuading, inducing or enticing, it is not essential to guilt under these terms that any particular method shall be employed. The terms persuade, induce and entice are used in the statute in their ordinary, popular sense, and imply the arts of entreaty, protestations of affection, allurements, promise of marriage, or similar means to influence the mind or inclination of the woman and induce her to consent to be transported for such immoral purpose. (Ass. of Er. LXIII.)

\* \* \* The indictment in this case is framed in five separate counts, which you will find to cover and in-

clude the several acts denounced in the statute “as I have outlined them above.” (Ass. of Er. LXIV.) \* \* \* These different counts are intended to meet the different phases of the act “which I have defined to you” \* \* \* under the different phases of this act, the only difference between the counts being the specific intent alleged. (You will observe that each one of these counts) covers an act committed, \* \* \* and so it is permitted to be charged in the various forms which are justified by the statute. (Ass. of Er. LXV.)

While the above language covers the portions of the instructions complained of and specified, yet it is necessary to read the whole of the instructions in which such language is found in order to see clearly what effect the portions excepted to may and could have had upon the jury. And to show more clearly the confusion, which apparently existed in the mind of the court relative to just what the charge was in the indictment, and which, of course, must have been communicated to the minds of the jurors, note the following language in that portion of the instruction set out in Ass. of Er. LXII, Spec. 8, to wit: “Under the first it is an offense to transport or aid or assist in the transportation of such female for the purpose denounced, whether she goes of her own volition, that is, willingly, *or is induced to go by the means stated in the statute* \* \* \* under the second it is an offense to procure or aid in the procuring of the means of transportation of such woman, whereby she is transported or carried for such unlawful purpose, and this whether she goes willingly *or is in-*

*duced by some one of the means mentioned in the statute to undergo such transportation \* \* \** ”

The quoted language in italics refers, of course, to the provisions of the so-called third phase of the act, that is, the persuading, inducing, enticing, or coercing the transportation denounced in Secs. 3 and 4 of the act.

Upon an examination of the instructions given by the trial judge in the Diggs-Camannetti cases, who also tried this case, it will be found that the instructions there given on the same subject were almost identically the same as here given; but in that case the defendants were indicted under both Sections 2 and 3 of the Act. The conclusion seems to be justified that the trial judge confused the allegations of the indictment in that case with the indictment in this case, and gave the same instructions in each case. If the trial judge was so confused, it is only reasonable to assume that the jury in this case was confused by the instructions.

In reading the statute, it is error for the court to read that portion thereof *which does not define the crime charged, but defines another and distinct crime.*

Jones vs. State, 22 Tex. App. 680, 3 S. W. 478, *unless he expressly limits the application of the statute to the charge in the indictment.* (Italics ours.)

Simons vs. State, (Tex. Cr. App., 1896), 34 S. W. 619;

Hargrave vs. State (Tex. Cr. App., 1895), 30 S. W. 444.

See also

Lee vs. State, 16 Ariz. 291, 145 Pac. 244;

Dow, *et al.* vs. U. S. (C. C. A.), 82 Fed. 904.

As a general rule it is the duty of the trial court to instruct the jury distinctly and *precisely* upon the law of the case. (*Italics ours.*)

16 C. J. 962, and cases cited.

In the case at bar it will be observed that the court not only instructed as to the provisions of the Act not applicable, to wit, the so-called *third phase*, but specifically instructed also that the indictment covered and included the several acts denounced in the statute as outlined by the court. The following is the language referred to: "The indictment in this case is framed to cover and include the several acts denounced in the statute as I have outlined them above \* \* \* " (Spec. 10; Ass. of Er. LXIV); and "These different counts are intended to meet the different phases of the act which I have defined to you \* \* \* " (Spec. 11; Ass. of Er. LXV.) Thus the error was repeatedly emphasized, and could not fail to impress the jury and confuse them. That it was reversible error we think there can be no question.

Spec. 12. It was error to give this instruction in the language given, because it assumed that the evidence showed that immoral relations had existed between the defendant and Mrs. Northcutt after the alleged transportation from Reno to Sloat, if not before. While the instruction is probably correct as an abstract principle of law, and, of course, would be

if the evidence in the case showed that there had been immoral sexual relations between the parties, either before or after the alleged transportation, and particularly in this case after the alleged transportation, yet, upon a reading of the whole instruction it must be conceded that the jury understood therefrom that there was no question in the mind of the court that such immoral relations did exist after such alleged transportation; while as a matter of fact there was no direct evidence of any such relations; it was all circumstantial, to say the least, and the question should have been left entirely to the determination of the jury.

Spec. 13. It was reversible error for the court to give this instruction on the presumption of innocence as it was modified by the court by the inclusion of the words *in its charity*. (Ass. of Er. LXVIII; See Inst., Tr. p. 421, lines 9 to 12, inc.; Exc., Tr. p. 438, lines 11 to 13 inc.) In Spec. 15, Ass. of Er. LXXII, Exc. Tr. pp. 350-351, will be found a correct instruction on this subject offered by the defendant and which the court refused. The instruction as given deprives the defendant of his constitutional right in that behalf. It belittles the principle of law involved therein, and must have impressed the jury with the idea that it was a mere form of expression which did not bind them in any way. We can find no authority for thus emasculating this most important instruction.

The accused is entitled to, and it is error to refuse on request, a proper instruction on the presumption of his innocence which goes with him throughout the

trial, or until it is met and overcome by the evidence in the case.

16 C. J. 983, and cases there cited in support of the text.

The instruction offered by the defendant (Offered Inst. No. 4, Tr. p. 433) was the proper instruction to be given and to which the defendant was entitled; and the one given by the court in lieu thereof, to wit: "The law, *in its charity*, presumes the innocence of a defendant, and that presumption abides with him throughout the trial, and until his guilt is established by the evidence," (Tr. p. 421.) deprives the principle of its force and effect by the inclusion of the words "in its charity" and could not help creating in the minds of the jury the impression that they were not bound to give the defendant the benefit of that presumption. We most respectfully insist that this is reversible error.

Spec. 14. Defendant's offered instruction set out in this specification should have been given. (Spec. 14; Ass. of Er. LXXI; Offered Inst. No. 2; Tr. p. 432.) The court's instruction defining these terms, "concubine," "mistress," and "debauchery," was not applicable to this case and were inaccurate. The statement that to constitute the relation of "concubine," and "mistress" it is not necessary that such cohabitation or living together shall continue during any fixed or definite period of time (Tr. p. 417) is inaccurate in this: That it assumes that such relationship might be established by proof of only one act of sexual intercourse (though there was no evidence of

even that fact). The court's definition of the term "debauchery" is a strained construction or definition of the term. Defendant's offered definition: "Debauchery means that the woman is to be subjected repeatedly to unlawful sexual intercourse or fornication or adultery," is the correct definition of the term, as it is used in this statute, and these definitions have been approved in a similar case before this court.

Suslak vs. U. S., (C. C. A.) 213 Fed. 913.

The court did not define the term "cohabit" at all, and this should have been done by the giving of the offered instruction defining said term. Mere association, expressions of love and affection, and the like, could not constitute debauchery, concubinage, cohabitation.

Spec. 15. This specification was argued under our Specification 13, *supra*.

Spec. 16 and 17. The instructions requested by defendant as embodied in these two specifications should have been given. The uncontradicted testimony of Mrs. Northcutt, Tr. pp. 307-400, as corroborated by defendant's witness Joe Walker, Tr. p. 273, shows that she had a home there at Sloat as a large stockholder in the mining property, and was taking an active interest in the operations of the mine, and was elected a director. The defendant was entitled to those instructions, and the withholding of them deprived him of a substantial right.

Spec. 18. This specification has been argued, with citations of authorities, in connection with Specification 3, *supra*, to wit, relative to the question

of the legitimacy of Mrs. Northcutt's youngest child.

Spec. 19. That the court abused its discretion in denying defendant's motion for a new trial is, we think, sufficiently shown by argument and citation of authorities under each of the preceding specifications. The errors complained of are plain, and although no motion for a directed verdict was made, the court is authorized to review the evidence in such cases.

Wiborg vs. U. S., 163 U. S. 632, 41 L. Ed. 289;

Clyatt vs. U. S., 197 U. S. 207, 49 L. Ed. 726.

The testimony of Mrs. Northcutt, Tr. p. 316, and the admission of the prosecution, Tr. p. 317, show that the automobile in which the alleged transportation from Reno to Sloat took place, was Mrs. Northcutt's private car. She was simply driven by the defendant in her own private automobile to her then place of residence at Sloat, and there was no element of "commerce," interstate or otherwise, in the transaction. No fare was paid by either the defendant or Mrs. Northcutt. She was not a "passenger" nor was she "carried or transported as a passenger" in interstate commerce, as required by Sec. 5 of the White Slave Traffic, in order to give the court jurisdiction to try the defendant.

It is respectfully submitted that the judgment should be reversed.

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